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86-722

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October Term 1986
No._____

BARBARA BAILEY HOWARD,

Petitioner,

vs.

JOHN O. MARSH, JR.,
Secretary of the Army,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the
United States Court of Appeals
for the
Eighth Circuit

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QUESTIONS PRESENTED

1. Whether due process of law under the 5th Amendment to the United Stats Constitution is denied, and whether the Privacy Act of 1974, 5 U.S.C. 552a et seq., and Title VII of the Civil Rights Act of 1964, as amemded, are violated in a federal employment discrimination procedure when:

A. an Army installation commander conducts his own secret, unauthorized investigation into a discrimination complaint, using employees of his own command, despite receipt of an authorized report of investigation conducted by another agency of the Army [United States Army Appellate Review Agency (USACARA)] outside that portion of the agency from which the complaint arose, and when this commander is required to adopt, reject, or modify the decision recommended solely upon information within the authorized federal complaint file; and

B. disclosure of records pertaining to petitioner was made to employees at this same Army installation as part of their conducting the secret investigation as ordered by the Army commander from which report he made his determination on petitioner's complaint of discrimination.

2. Whether due process of law under the 5th Amendment is denied in a federal employment discrimination procedure when both 29 Code of Federal Regulations 1613.201, et seq. and 5 United States Code 552a et seq. are not adhered to by agencies of the United States.

3. Whether a Department of the Army installation commander who is implicated in a finding of discrimination has abused his power and authority by generating his own EEO investigation upon which to adjudicate a complaint of discrimination which could become the final decision of the agency without first publishing in the Federal Register as required by §552a(e)(4)(A) through (I) and (11), which provides for notice and comment from interested persons on any new or intended use of the information in the system.

4. Whether due process of law is denied when this same commander adjudicates the complaint of discrimination based only upon his secret, unauthorized EEO investigation in violation of 29 C.F.R. 1613.222 which specifies the contents of a complaint file, which in no way specifies the contents of the file generated by the commander's own secret investigation rather than by the Army's authorized investigator, USACARA, and when implementing

guidelines in Federal Personnel Manual Letter 713-42, specifically proscribe alleged discriminating officials from such exercising such control over a file.

5. Whether disclosure of the authorized USACARA EEO complaint file to the commander implicated in a positive finding of discrimination, in favor of petitioner, who in turn directed employees under his command to conduct the secret EEO investigation is in conformance with the provisions under 5 U.S.C. 552a(b)(1) as "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties" as well as under 29 C.F.R. 1613.201. [See 596 F. Supp. 1107, appendix] and the U.S. Army Civilian Personnel Regulation (CPR) 700 (Ch. 16), 713-B, which authorize USACARA only to conduct such EEO investigations.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned petitioner by her counsel, certifies that there are no other interested parties other than those named in the caption of this case and their attorneys of record.

By: _____
ROGER S. HANSON,
Attorney for the Petitioner
Member of the Bar of the
United States
Supreme Court

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SUPREME COURT OF THE UNITED STATES
October Term, 1986

No._____

BARBARA BAILEY HOWARD,

Petitioner,

vs.

JOHN O. MARSH, JR.,
Secretary of the Army,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner, Barbara Bailey Howard, hereby prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 8th Circuit entered on March 23, 1986, entitled **Howard v. Marsh**, 785 F.2d 645 (8th Cir. 1986), rehearing denied, May 29, 1986. which reversed the Memorandum Order of the United States District Court for the Eastern District of Missouri, the Honorable Edward L. Filippine, District Judge, entitled **Howard v. Marsh**, 596 F. Supp. 1107 (E.D. Mo. 1984).

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its published opinion in this case as **Howard v. Marsh**, 785 F.2d 645 (8th Cir. 1986). This opinion is set forth in the appendix at page 30.

A rehearing was denied on May 29, 1986. That order appears in the appendix at page 57.

The United States District Court for the Eastern District of Missouri, the Honorable Edward L. Fillippine, U.S. District Judge, issued its memorandum opinion entitled **Howard v. Marsh**, 596 F. Supp. 1107 (E.D. Mo. 1984) on April 14, 1984. A copy of that Memorandum Opinion is set forth in the appendix at page 51.

JURISDICTION

Pursuant to the above dates, decisions, and order, the United States Court of Appeals for the 8th Circuit last acted on this case on May 29, 1986, when it denied rehearing. This Honorable Court has jurisdiction to review this case under 28 U.S.C. 2101(c) within 90 days of May 29, 1986. Said 90-day period expires August 27, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part: See appendix, p. 58, (A).

Under 5 U.S.C. 552a it is provided in pertinent part, emphasis added: See appendix, p. 58, (B).

Under 5 U.S.C. 552a(b)(1), it is provided in pertinent part, with emphasis added: See appendix, p. 58, (C).

In pertinent part, 29 C.F.R. 1613.216(a) provides: See appendix, p. 59, (D).

And under 29 C.F.R. 1613.222 it is provided in paragraphs (a) through (k) what should be included in the complaint file. It does provide for the authorized agency EEO file only.

In §1613.217 "Adjustment of Complaint and offer of hearing" it is provided, with emphasis added: See appendix, p. 59, (E).

Moreover, under the Army's Civilian Personnel Regulation, CPR 700 (C 16) 713.B-6h(3), "Investigator's Report", it is provided, with emphasis added: See appendix, p. 59, (F).

In petitioner's case this prescription that when the activity commander is the alleged discriminating official (ADO), the report would be submitted to the next higher commander for action, was ignored.

STATEMENT OF THE CASE

Petitioner Barbara Bailey Howard was a white female civilian employee of the Department of the Army at the U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) at St. Louis, Missouri. From December, 1978 to February, 1981 she was an Equal Employment Opportunity (EEO) Officer at GS-13; on the latter date she was downgraded to GS-11 and received a job classification of Supply Cataloger.

In September, 1980, as a consequence of failing to receive an in-grade salary increase within GS-13, and with the threat of a subsequent downgrade, petitioner filed a formal employment discrimination complaint based on sex. In October. 1980, this complaint was subsequently amended to include race. The complaint also included allegations of prohibited retaliatory actions because of petitioner's efforts to prosecute complaints of discrimination.

Pursuant to Army regulations, the complaint was referred to "USACARA", the United States Army Civilian Appellate Review Agency, for independent investigation. On December 16, 1980. petitioner wrote to the Secretary of the Army protesting the commanding general at her command (from which the complaint arose) being designated the adjudicating official for the proposed disposition of

her complaint of discrimination. Petitioner thereby put the Secretary on notice regarding his responsibility to safeguard her record according to the provisions of §552a et seq. Petitioner also requested that the Secretary of the Army "freeze" the proposed demotion action until after receipt of the USACARA investigator's report.

In January, 1981, Investigator Jasper of USACARA, from the Dallas regional office, initiated the investigation. Mr. Jasper solicited input from petitioner and various TSARCOM officials. He conducted an on-site visit and obtained sworn statements from a number of witnesses.

Petitioner was demoted two (2) grades from GS-13 EEO Officer to GS-11 Supply Cataloger on February 7, 1981.

The USACARA ROI was submitted on April 3, 1981 to George Jones, Director of Equal Employment Opportunity, U.S. Army Materiel Development and Readiness command (DARCOM), Alexandria, Virginia, who referred the ROI to the commander of TSARCOM, Major General Emil L. Konopnicki. As the result of his findings, the investigator found evidence of sex discrimination. Jasper recommended a decision of sex discrimination in the summary of his report of investigation (ROI). The report recommended that petitioner be restored to her GS-13 EEO Officer position at TSARCOM.

Under applicable regulations, Konopnicki was limited in his capacity to "reject, modify, or approve the recommendations contained in the investigative file". Regulations of the Equal Employment Opportunity Commission(EEOC), expressly made applicable to the Department of the Army by 29 C.F.R. §1613.202(b)(i)(1982), required Konopnicki to make his decision "based on information in the complaint file" [29 C.F.R. §1613.221(a)].

The only investigative documents that are to be

included in the "complaint file" are documents contained in the "investigative file." 29 C.F.R. §1613.222(d). Only persons who are not, "directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose" are authorized to investigate and include documents in the"investigative file" [29 C.F.R. §1613.216(a)]. In the Department of the Army, authority to investigate discrimination complaints is given only to USACARA [DA CPR 700 (Ch. 16). 713.B-6a(1)]. Furthermore, when the activity commander is an ADO the investigator's report is to be submitted to the next higher commander for action [§713.B-6h(3)].

Notwithstanding the discrimination complaint processing requirements stated above, Konopnicki. who alleged the ROI was incomplete, biased and did not reflect management's position, directed that a secret EEO investigation be initiated by two TSARCOM employees who were under his chain of command at TSARCOM. Attorney Robert Willenbrink and Civilian Personnel Specialist Velada Henson acted to secure, compile and assemble from various sources at the command some one-hundred-eleven (111) exhibits, and over 1000 pages concerning petitioner.

Moreover, these investigators also generated new documents for the report, including a sworn affidavit and other statements and reports. Their secretly generated file contained a cover report and the total report is entitled "Management's Position and Rebuttal to USACARA's Report of 3 April. 1981 In the Complaint of Ms. B. Bailey Howard."

It was upon the results of his own secret investigation and the report developed by Willenbrink and Henson that Konopnicki predicated his determination that petitioner had not been discriminated against [see 8th Circuit opinion, paragraph 3.

final sentence]. The general explicitly stated that he relied on the report he had directed be generated for his adjudication. None of this activity was made known to petitioner until after June 22, 1980, when she received Konopnicki's proposed disposition with his secret Management Rebuttal Report attached.

On April 4, 1984, following an evidentiary hearing, U.S. District Judge Edward Filippine ruled that Konopnicki's unorthodox action of generating a new discrimination report when he was sitting as the decision maker violated the provision of the Privacy Act of 1974, 5 U.S.C. 552a et seq., and 29 C.F.R. 1613.201 et seq. [**Howard v. Marsh**, 596 F. Supp. 1107 (E.D. Mo. 1984)]

The District court ruled that the general could not direct employees of TSARCOM, that part of the agency from which the complaint arose, in violation of the Privacy Act, to gather information on petitioner, as the original investigative effort was confined by regulations of the Army to USACARA. The District Court's holding was appealed by respondent Marsh to the U.S. Court of Appeals for the 8th Circuit.

The Circuit Court, in contrast, found that there was yet time for TSARCOM to "respond to" the discrimination complaint at a time when the investigative stage had been closed by the ROI and had been placed before the general for a determination, and thus the head of TSARCOM could authorize the gathering of clandestine, secret evidence to aid in his decision of an employment discrimination case arising out of that part of the Department of the Army which he heads. **Howard v. Marsh**, 785 F.2d 645 (8th Cir. 1986).

Thus, the Circuit reversed the District Court on the narrow issue that Konopnicki did not violate the

Privacy Act by ordering employees under his command to secure additional documents beyond those assembled in the USACARA investigations culminating in the ROI then before the general for decision. [**Howard v. Marsh**, 785 F.2d 645 (8th Cir. 1986)]

ARGUMENT

PETITIONER WAS DENIED DUE PROCESS OF LAW BY INTENTIONAL AND WILLFUL VIOLATION OF PROCEDURES IN HANDLING HER EMPLOYMENT DISCRIMINATION CLAIM ARISING FROM HER DEPARTMENT OF THE ARMY CIVILIAN POSITION BY VIOLATIONS OF THE PROVISIONS OF 29 C.F.R. 1613.201 ET SEQ. AND 5 U.S.C. 552A ET SEQ. CERTIORARI SHOULD BE GRANTED TO ESTABLISH THROUGHOUT THE FEDERAL SYSTEM THAT A DECISION MADE BY THE HEAD OF THAT PART OF THE AGENCY FROM WHICH THE COMPLAINT AROSE AND BASED ON HIS OWN UNAUTHORIZED AND SECRET INVESTIGATION OF THE COMPLAINT IS ILLEGAL AND VIOLATES DUE PROCESS OF LAW.

Petitioner Barbara Bailey Howard was a civilian employee of the Department of the U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) at St. Louis, Missouri, from December, 1978 until 1982, when she resigned from TSARCOM employment. As stated, supra, her Title VII complaint, which included issues related to constructive discharge, is presently on appeal before the 8th Circuit.

From December, 1978 to February, 1981, petitioner enjoyed a rating of GS-13 as an EEO Officer; however, in the latter months of her employment she was down-graded to a rating of GS-11 and

reclassified to Supply Cataloger.

In September, 1980, petitioner initiated a formal administrative complaint of employment discrimination concerning denial of a within-grade GS-13 salary step increases. In December, 1980, petitioner's supervisor, Colonel Booker T. McManus, recommended that petitioner be downgraded from GS-13 to GS-11 for "unsatisfactory performance". This action was included in the formal complaint as an example of on-going pattern and practice of discrimination.

Pursuant to regulations, the complaint of petitioner had to be investigated by an agency disparate from that one employing her. In this case, in January, 1981, William Jasper, an authorized Army investigator form United States Army Civilian Appellate Review Agency (USACARA), Dallas, Texas, conducted a comprehensive investigation into petitioner's discrimination complaint, a process that freely allowed his access to any and all of petitioner's records as he deemed relevant. Jasper was the only person allowed to investigate and include documents in the investigation file; and as a trained, professional EEO investigator he had the full obligation to generate and compile all documents necessary for the ultimate findings.

In pertinent part, 29 C.F.R. 1613.216(a) provides:

See appendix, p. 60, (G).

A completed report of investigation (ROI) signed by Jasper and approved by the director of the Dallas USACARA was duly submitted to George Jones, Director of EEO DARCOM on April 3, 1981. DARCOM, which is located at Alexandria, Virginia, is the superior command to TSARCOM.

The USACARA ROI recommended reinstatement of petitioner to her former GS-13 EEO Officer position by finding a failure to grant a within grade

salary increase and reduction in grade were based on prohibited forms of sex discrimination. The ROI implicated "the commander" of TSARCOM (MG Emil L. Konopnicki) as one who was responsible for some of the events which led to the finding of discrimination. This was the same official whom the Director of EEO for the Army, responding to petitioner's letter to the Secretary of the Army, had assured her that her complaint would be adjudicated in a fair and impartial manner. This was also the same official who was selected to sit and did so sit on the ultimate determination in the Army's proposed disposition that petitioner had **not** been discriminated against.

This action was taken despite a real conflict of interest proscribed in the Department of the Army Civilian Personnel Regulation [DA CPR] 700-B-16(h)(1)]: When a commander is the ADO the complaint is to be elevated to the next higher command for adjudicative action.

The Circuit Court ruled that subsection (b)(1) of 5 U.S.C. 552a permits disclosure of a record "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." The issue in debate is, of course, why this record was not safeguarded in compliance with §552a, §1613 et seq., FPM Letter 713-42 and CRP 700 et seq. to preclude it falling into the control of ADO Konopnicki and thereby allowing him to conduct a secret Management Rebuttal investigation of his own upon which to determine the proposed disposition of petitioner's complaint for the agency.

In a footnote, the Circuit Court states that there is "no indication in this or any other regulation that an agency is barred from reviewing its own files for the purpose of preparing its response to a complaint of discrimination." Petitioner has always

agreed with this concept. What she has taken exception to is the failure of TSARCOM officials to cooperate with the complaint process by restricting their efforts to this role.

The Circuit Court found that the proceedings in the instant case were at the "informal adjustment" stage at the time the Management Rebuttal was prepared and therefore researching agency records at Konopnicki's direction was a proper action. The confusion here has to be in what role is Konopnicki serving? Is he an unbiased decision-making official, is he a prosecutor for the Army at TSARCOM, is he an authorized EEO investigator, or is he a defendant for his own and other manager's actions?

Federal Personnel Manual Letter 713-42, entitled "Participation in the Discrimination Complaint Process of Persons Named as 'Alleged Discriminating Officials', was originally promulgated by the U.S. Civil Service Commission, later the Office of Personnel Management, as an implementing guideline to the CFR. Upon the President's 1978 reorganization, the EEOC took over the Federal EEO program management. All FPM letters regarding EEO were left in place under the EEOC. These further implementing EEO instructions in FPM letter 713-42 state in pertinent part, with emphasis added: See appendix, p. 60, (H).

Petitioner has continued to assert that her due process rights were violated when the Title VII legislation, and the supplementing regulations and guidelines, designed to protect her, were never effectively implemented. She has asserted that the purpose for that legislation was thwarted by the Secretary of the Army's failure to provide a system to safeguard her discrimination complaint file and its method of processing. She has asserted that the

Secretary's failure has lead to a willful and intentional violation of the Privacy Act.

1. IT IS EVIDENT THAT THE PROCEDURES EMPLOYED BY KONOPNICKI, AS HEAD OF TSARCOM, IN GENERATING HIS SECRET EEO INVESTIGATION AND COMPILATION OF AN UNAUTHORIZED INVESTIGATIVE RECORD, VIOLATED PROVISIONS OF THE NECESSITY TO FIRST PUBLISH SUCH PROCEDURE IN THE FEDERAL REGISTER: HE FAILED TO COMPLY WITH PROVISIONS FOR PUBLIC NOTICE AND COMMENT ON THE GENERATION OF A NEW RECORD FOR THE ARMY.

The Privacy Act, under 5 U.S.C. 552a "Records maintained on individuals, (e) AGENCY REQUIREMENTS," states, with emphasis added: See appendix, p. 61.

The only "system of records" which the Army publishes under EEO Discrimination Complaint Files are those generated by an authorized Army investigator. Thus, the "Management Rebuttal" file does not qualify and is not a file name published in the Federal Register in compliance with the Privacy Act.

Under (e)(3)(A) the Acts speaks to the authority (whether granted by statute, or by executive order of the President) which authorized the solicitation of information. Therefore, the Act itself responds to the issue of authority by which records may be collected, maintained, used or disseminated by agency officials.

In addition, a proposed disposition of a discrimination complaint such as Konopnicki adjudicated becomes a published order of the agency and can have the effect of setting policy by controverting

the stipulations in §552a(e)(4) and (11) [**Securities & Exchange Comm. v. Chenery Corp.**, 332 U.S. 194 (1947)]. Although only the subject of an order is bound by it, the order does provide notice for the agency policy. Therefore, a form of rule-making can be performed through Konopnicki's adjudication in petitioner's proposed disposition for the Army.

The rule-making effect of using an adjudicative order rather than the statutory requirements for notice and comment have the effect of nullifying the intent of Congress. The fact that there was no publication of the use of the secret Management Rebuttal file as required by §552a(e)(11) which was used for a purpose not stipulated in any law, Presidential executive order or agency regulation violates the holding laid down in **National Labor Relations Bd. v. Wyman-Gordon Co.**, 394 U.S. 759, 764 (1969): This agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law.

And in **Morton v. Ruiz**, 415 U.S. 199, (1974), where a secret standard was used by the agency, the Court held that: "[A]t a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."

Certainly, the complaint file is never intended to be set under an ADO's power and control because, as the FPM letter addresses: "18. These instructions contemplate increased access for alleged discriminating officials to information contained in complaint files, which are subject to the provisions of the Privacy Act (5U.S.C. §552a). Disclosure to alleged discriminating officials will be made consistent with the foregoing instructions as a **routine use**." Emphasis added. Then the FPM

letter prescribes the safeguards to be employed in allowing an ADO to view the file. There is never any provision for an ADO to have control over the file -- to add. delete or generate new documents to the file.

In addition, throughout 19 C.F.R. 1613 et seq.. the complaint file collection, use, maintenance, and dissemination is guarded by various officials who have EEO expertise or are impartial triers of fact: the EEO officer [§1613.204]; the EEO counselor [¶.213]; the investigator [¶.216]; the complaints examiner [¶.218]; or the federal district court [¶.281]. Therefore, Konopnicki not only should never have conducted his own EEO investigation, he should not even have had power and control over the official EEO complaint file itself. But for having this power and control, the events which led to petitioner's reasons for bringing this lawsuit could never have occurred.

The foregoing actions made the head of that part of the agency at which petitioner was employed, MG Emil L. Konopnicki of TSARCOM, an advocate in his own defense while at the same time he set himself up as an investigator who developed a secret, illegal complaint file upon which he made a determination for the Army. In effect, Konopnicki was (1) an alleged discriminating official, (2) implicated in a finding of discrimination at TSARCOM, (3) a personal advocate, (4) an unauthorized EEO investigator, and (5) an adjudicator, all in the same complaint of discrimination.

Essentially, federal procedure was properly followed by the complaint arising within TSARCOM being investigated by the independent USACARA; its authorized and qualified investigator generated the complaint file or ROI which contained his summary report recommending petitioner be reinstated to her prior GS-13 EEO Officer position; that report was forwarded to the DARCOM Director of EEO who forwarded it to Konopnicki to perform the limited function of adopting, reject-

ing or modifying the recommendations contained in the investigative file.

2. SINCE ATTORNEY WILLENBRINK AND PERSONNEL SPECIALIST HENSON WERE EMPLOYEES OF THAT PART OF THE AGENCY FROM WHICH THE COMPLAINT AROSE THEY ARE PROHIBITED BY 29 C.F.R. 1613.216(A) FROM BEING ASSIGNED TO INVESTIGATE AN EMPLOYMENT DISCRIMINATION COMPLAINT ARISING WITHIN TSARCOM; AND THUS THEY COULD NOT CONDUCT SUCH AN INVESTIGATION "IN THE PERFORMANCE OF THEIR DUTIES.

Upon reviewing the ROI with the compilation of evidence gathered by the Dallas USACARA investigator and which constituted the sole basis for his finding. Konopnicki concluded that the ROI and its attachments were incomplete, biased and did not reflect management's position. He thereafter embarked on a personally authorized, unlawful and clandestine investigation aimed at gathering. generating and compiling documents in a file with a cover report which included "Management Rebuttal" in its title.

The Circuit Court erroneously concluded that the purpose for the generation of the Management Rebuttal file was preparation for the informal adjustment meeting which occurs after receipt of the authorized USACARA investigative report. However, the record shows that this could not possibly be the case. There is no mention of this report in the adjustment meeting transcript, and Willenbrink attended that meeting. There are documents in the secret Management Rebuttal report which were specifically generated for that report and are dated after the May 16, 1981, informal adjustment meeting. In addition, the general's proposed disposition was delayed until June 22. 1981, because of his desire to conduct his own investigation over and above that conducted by the authorized USACARA investigation.

Therefore, the Circuit Court erroneously held that the purpose for Konopnicki's secret investigation was somehow related to the informal adjustment meeting. The government at one point in the trial proceeding also alleged that the purpose for generating the secret investigation was to defend itself at the EEOC hearing. Again, this explanation was also a mere pretext. Petitioner is the one to request an EEOC hearing and she could not do so until **after** receipt of the proposed disposition, which Konopnicki could not render until **after** the adjustment meeting [§1613.217].

Moreover, arguendo, even if the Management Rebuttal file upon which Konopnicki based his proposed disposition decision was a proper file under §1613 et seq., the agency failed to hold any kind of adjustment meeting with petitioner to discuss this file, which would be a requirement under §1613.217. Hence the reason for petitioner's labeling this record a "secret counter-investigation."

In its discussion the Circuit also states that the Tenth Circuit's decision regarding **Hernandez v. Alexander**, 671 F.2d 402 (10th Cir. 1982), supports Army disclosure of an employee's personnel file contents to staff officials in the course of their inspector general duties. Petitioner has never denied that Army officials had the right to disclosure of a file in the course of their legally authorized duties.

In the **Hernandez** case, the need of attorneys and other government officials is not the same as was Konopnicki's in petitioner's case. The only section of **Hernandez** which can conceivably relate to petitioner's case is "Part IV". All other references in the case are to an Army Inspector General (IG) report of investigation (ROI). All references to an ROI in the **Hernandez** case are therefore made to this IG report and are not references to a USACARA ROI. IG ROIs obviously come under other statutes and regulations than do those of USACARA ROIs. Nowhere in Title VII, §1613 et seq.,

FPM Personnel Letter 713-42, or the Army Civilian Personnel Regulation 700 (C16) is an IG ROI referenced. The only reference made in this statute, regulations and guidelines is to authorized EEO investigations.

Hence **Hernandez** cannot be used to extrapolate an IG ROI to Konopnicki's Management Rebuttal or the USACARA role within Army to carry out investigations of discrimination complaints. Konopnicki's actions were specifically proscribed by §1613.216(a) which prohibits a person assigned to investigate a complaint from coming from that part of the agency from which the complaint arose.

The Circuit Court held that the Management Rebuttal investigation was appropriately received into evidence at the hearing before the "claims examiner", thereby becoming part of the hearing record and thus part of the complaint file on which the Secretary's decision is to be based. This holding si made despite the fact that the government failed to cite any statute, Presidential executive order, or implementing regulation to support the generation of its "Management Rebuttal" record. It was made despite the fact that the agency is required to publish annually all systems of records and this system is not found in the annual Army publication for its system of records [§552a(e)(4) and (11)].

The result of the general's secret investigation was willfully and intentionally concealed from petitioner until after he had made his determination based on its contents. This was done despite the fact that the argument for making the investigation, as alleged by Konopnicki, was based on a full opportunity for management to have input in an EEO investigation; while opportunity for any input to the secret EEO investigation was denied petitioner by Konopnicki. Petitioner was not informed nor was her permission obtained for Konopnicki to conduct such an EEO investigation. In this instance, Konopnicki failed to adhere to §552a(e) under "Agency Require-

ments, which is quoted with emphasis added: See appendix, p. 61, (J).

The TSARCOM commander ordered his own secret EEO investigation which was conducted by TSARCOM Legal Counsel Willenbrink, who also served as advocate for management at administrative hearings, and Civilian Personnel Specialist Henson, who assisted Willenbrink in his activities. Civilian personnel regulations promulgated by the U.S. Office of Personnel Management specifically prohibit a personnel specialist from working with an EEO complaint of discrimination. Only qualified EEO professionals are authorized for such duties. This requirement is specifically prescribed in Title VII, §717(2) regarding "a description of the qualifications in terms of training and experience" for EEO officials.

Konopnicki stated that it was upon the results of his own investigation that he, acting with the delegated responsibility from the Secretary of the Army to adjudicate the complaint, determined that there was no discrimination in the employment actions taken regarding petitioner. Therefore, the general predicated his determination solely on his own unlawful investigation and not on that of the USACARA investigator. He "rejected" the USACARA ROI finding and recommendation, replacing the finding and recommendation with those of his own investigation.

Under DA CPR 700 (16), 713.B-6a(1), authority to investigate discrimination complaints is delegated to USACARA and only persons who are not "directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose" are authorized to investigate, compile and generate documents for the EEO investigative files. See 29 C.F.R. 1613.216(a). Thus, only a USACARA investigator is authorized to generate petitioner's EEO investigative file and the adjudicating official's authority lay only to "accept, reject or modify the recommendations contained in the investigative

file"; Konopnicki, in this case, could not generate his own independent compilation from the hands of his own employees who were effectively unqualified and unauthorized EEO workers, from which he made a determination for the Army. Of importance is the fact that Konopnicki's opinion could have ultimately become the final decision of the agency had petitioner not pursued any further action.

3. IT IS EVIDENT THAT PETITIONER NEED NOT HAVE THE PRESCIENCE TO IDENTIFY, AB INITIO, ALL "ALLEGED DISCRIMINATING OFFICIALS" (ADO) AS, OF COURSE, THE USACARA INVESTIGATION, CULMINATING IN THE ROI, DETERMINES THE FACTS AND IDENTIFIES ANY OFFICIALS FOUND IMPLICATED IN THE FINDING OF DISCRIMINATION.

FPM Letter 713-42, provides in paragraphs 4 and 5, in part, with emphasis added: See appendix. p. 62, (K).

In fact Konopnicki was proscribed from having control of the official USACARA file by regulations, including Federal Personnel Manual Letter 713-42. In ¶4, the FPM letter does not require that a complaint of discrimination include identification of "alleged discriminating officials" (ADOs). Paragraph 5 states the principal purpose of discrimination complaint procedures to determine whether in fact discrimination has occurred so that remedial action can be taken.

The government's contention as stated on page 11 of its appeal brief to the 8th Circuit contradicts the FPM letter; in this regard, it states: "As the commander of the installation accused of discrimination, Gen. Konopnicki had the responsibility **to formulate the agency's response** to the complaint, to **prepare the agency's defense**, and to **examine pertinent agency** records in so doing." Emphasis added. In footnote 9 the government

argues that "But there is no regulation cited by the court or of which we are aware that would preclude an agency from investigating for the purpose of formulating its response to the complaint. That would not only handicap the agency in **defending** its position, but would also reduce the likelihood of having discrimination complaints settled at the earliest possible time." Emphasis added.

Therefore, the government's contention is in contradiction with the regulations by holding that the general was in an **adversary position** with regard to his function in the complaint processing, while the regulations hold that an official in his position must be **fair and impartial**. Obviously, an official cannot be in an adversary position and at the same time be fair and impartial. This has been petitioner's contention throughout the prosecution of this lawsuit.

4. IF MAJOR GENERAL EMIL L. KONOPNICKI CONCLUDED THAT THE NEUTRAL ROI PREPARED BY THE AUTHORIZED ARMY AGENCY, USACARA, WAS IMNCOMPLETE. FAILED TO REFLECT MANAGEMENT'S POSITION AND WAS BIASED HIS RECOURSE WAS TO REFER IT BACK FOR SUPPLEMENTAL INVESTIGATION BY USACARA AND THE PREPARATION OF A SUPERSEDING REPORT.

In no case could Konopnicki prepare a secret investigative file on petitioner using TSARCOM employees Willenbrink and Henson, as that violates §1613.216(a) which provides that the person assigned to investigate a complaint of discrimination must not come from that part of the agency from which the complaint arose.

Since it is evident that Konopnicki could only refer the ROI back to George Jones at DARCOM for him to request further investigation of USACARA, Konopnicki could not conduct his own secret investigation where

said secret investigation had the effect of violating § §8 and 12 of the FPM Letter 713-42, which provides in part, with emphasis added: See appendix, p. 62, (L).

If MG Emil L. Konopnicki concluded that the authorized EEO ROI prepared by a neutral government agency, USACARA, was incomplete, biased and did not reflect management's position, his recourse was to refer it back through the managing EEO officer, George Jones at DARCOM, for supplemental investigation as pursuant to paragraph 12 of FPM Letter 713-42.

In this instance, when Jones found that Konopnicki was more than just an ADO but was **implicated** in the finding of discrimination, he should have only shown him a redacted version of the file, with names and identifying information deleted. Again, at this point in the complaint proceedings Konopnicki is no longer an ADO, he is found to be implicated in the events which lead the USACARA investigator to find that petitioner was the victim of sex discrimination at TSARCOM. And the guidelines are clear that the EEO officer may request "such additional investigation as may be needed [FPM Letter 713-42.12]." Moreover, a gross conflict of interest arose requiring Konopnicki to hereafter disqualify himself from ever sitting in an adjudication of petitioner's complaint.

Petitioner wrote to the Secretary of the Army on December 16, 1980, about the DARCOM EEO officer's decision that Konopnicki could be the determining official for the proposed disposition. She received no response until April 8, 1981, some 16 weeks later. (It must be remembered that the USACARA ROI is dated April 3, 1981, and respondent's adverse action to demote her occurred in February, 1981.) Petitioner wrote to the Secretary: "The three top officials at this command not only have connecting doors, meet daily for regular staff meetings, but the chief of staff rides in a carpool with the

commander."

In the response from the Office of the Secretary of the Army Director of EEO, petitioner was told: "Please be assured that you will receive fair consideration in the adjudication of your complaint."

Thus, despite petitioner's placing the Secretary of the Army on notice about her concerns regarding a fair adjudication of her discrimination complaint, no action was taken to safeguard her discrimination complaint file as required in §552a(e)-(10), §1613 et seq., and FPM Letter 713-42.16 regarding procedures to process a complaint which do not include a Management Rebuttal file. But for petitioner's USACARA EEO file being provided to Konopnicki. his secret counter-investigation could never have been initiated for the purpose of using it to adjudicate petitioner's proposed disposition.

Notwithstanding the foregoing facts, what is most remarkable is the fact that petitioner filed her Title VII complaint in Federal District Court. Eastern District of Missouri, on June 4, 1981, almost three (3) weeks before Konopnicki rendered his proposed disposition. At the least, the Army could no longer continue a pretense that Konopnicki was an impartial adjudicating official at that point. The reason petitioner could file in court under Title VII. §717, auspices was because her complaint processing had been delayed over 180 days. She had yet to even receive her right to file for an EEOC hearing which hearing was supposed to be completed within 180 days. The commander's investigation took some seventy-nine (79) days to complete: had Army regulations been complied with, petitioner would have received the proposed disposition within thirty-five (35) days of the USACARA report.

Certainly the complaint file is never intnded to be set under an ADO's power and control because, as the FPM letter addressed: "18. These instructions contemplate increased access for alleged discriminating officials to

information contained in complaint files, which are subject to the provisions of the Privacy Act (5 U.S.C. §552a)." The FPM letter goes on to discuss the Freedom of Information Act under which there is no exemption for the disclosure of discrimination complaint files.

The FPM letter states that disclosure to alleged discriminating officials will be made consistent with the foregoing instructions as a **routine use**. Then the FPM letter prescribes the safeguards to be employed in allowing an ADO to view the file. There is never any provision for an ADO to have control over the file -- to add, delete or generate new documents to the file. Hence, the Secretary of the Army upon being placed on notice of petitioner's concerns about the fair adjudication of her proposed disposition, failed to comply with §552a (e) (10) in safeguarding petitioner's records to "protect against any **anticipated** threats or hazards to their security or integrity which could result in substantial harm, embarrassment (sic), inconvenience, or unfairness to any individual on whom information is maintained [emphasis added]."

Petitioner testified to the shame she felt as an Army employee in these violations of her rights under the EEO complaint processing procedures which was amplified because of her EEO professional status in knowing what the correct procedures under the law should have been.

She also testified as to the extraordinary resources in time consumed and confusion created by being required to cite from two investigative files (USACARA, with over 800 pages, and Management Rebuttal, with over 1000), the majority of which had duplicated documentation.

In addition, throughout 19 C.F.R. 1613 et seq., the complaint file collection, use maintenance, and dissemination is guarded by various officials who have EEO expertise or are impartial triers of fact: the EEO officer [§1613.204]; the EEO counselor [¶.213]; the EEO

investigator [¶.216]; the EEO complaints examiner [¶.218]; or the federal district court [¶.281].

Therefore, Konopnicki not only should never have conducted his own EEO investigation, he should not even have had power and control over the official EEO complaint file itself. But for his having this power and control, the events which led to the reasons for bringing this lawsuit could never have occurred.

The foregoing actions made the head of that part of the agency at which petitioner was employed, MG Emil L. Konopnicki of TSARCOM, an advocate in his own defense while at the same time he set himself up as an investigator who developed a secret, illegal complaint file upon which he made a determination for the Army. In effect, Konopnicki was (1) an alleged discriminating official, (2) implicated in a finding of discrimination, (3) a personal advocate. (4) an unauthorized EEO investigator, and (5) an adjudicator all in the same complaint of discrimination.

Essentially, federal procedure was properly followed by the complaint arising within TSARCOM being investigated by the independent USACARA: its authorized and qualified investigator generated the complaint file or ROI which contained his summary report recommending petitioner be reinstated to her prior GS-13 EEO Officer position; that report was forwarded to the DARCOM Director of EEO who forwarded it to Konopnicki to perform the limited function of adopting, rejecting, or modifying the recommendations contained **in the investigative file**.

Again, of note is the fact that no informal adjustment meeting was ever conducted with petitioner to discuss the secret "Management Rebuttal" file upon which the general adjudicated his proposed disposition. The following citation from FPM Letter 713-42 is important in this regard. it is cited with emphasis added: See appendix. p. 63, (M).

The provision for complainants "to receive copies of the investigative file, the hearing transcript, etc." makes it clear that petitioner should have received copies of all documents regarding the EEO discrimination complaint pertaining to her. The fact that Konopnicki used the official information in petitioner's authorized USACARA ROI and her personnel files for a purpose not prescribed in any statute, Presidential executive order or regulation makes it clear that he used this official information for his own private purpose. He did not feel himself bound by the §552a et seq. requirements regarding improper disclosure. So too, the Secretary of the Army through his authorized agents did not ensure the safekeeping of petitioner's records from the private purposes to which Konopnicki used them: See appendix, p. 64, (N).

In petitioner's case the integrity of the complaint system suffered a severe blow. If the actions of Konopnicki and other Army officials are left to stand in violation of hte spirit as well as the letter of the regulations, it cannot hope to have but a most chilling effect on Federal employees and applicant's exercise of discrimination complaint rights: See appendix, p. 64, (O).

Again, the purpose of the Federal EEO implementing regulations and guidelines is made abundantly clear by ¶21. ADOs are to be informed regarding allegations against them and given a "full and fair opportunity to respond for the record." Petitioner testified that in her twelve years of EEO activity she had never seen an investigation such as Konopnicki conducted. Even Attorney Willenbrink testified that in the over 70 EEO complaint cases in which he had represented the command, he had never before conducted such an investigation.

5. MAJOR GENERAL EMIL L. KONOPNICKI SHOULD NEVER HAVE BEEN SELECTED OR DELEGATED TO ACT IN ADJUDICATING PETITIONER'S EMPLOYMENT DISCRIMINATION COMPLAINT.

Following the USACARA investigation -- the duly authorized. trained and qualified USACARA investigator, William Jasper, of Dallas, Texas. prepared his ROI. Inter alia, that ROI implicated the commander in the finding of discrimination against TSARCOM. This ROI was sent to George Jones at DARCOM, Alexandria, Virginia, the next highest command to TSARCOM. Even though the ROI placed Konopnicki as implicated in a finding of discrimination and despite petitioner's naming him in her lawsuit at Federal district court, the general was assumed by responsible Army officials to be capable of adjudicating the ROI as an unbiased trier of fact.

It is axiomatic that Jones should not have chosen Konopnicki. and it is very evident that the general should have disqualified himself since his bias was established by the USACARA ROI. In any event. he was and had been accused of the very discrimination that he was to pass judgment on.

Clearly. the general was piqued by the ROI when he felt it was "incomplete, misleading. and biased" (Court of Appeals opinion, third paragraph). and he thereafter embarked on his own illegal and unprecedented research and generation of his own investigative file where input was supplied by an attorney and personnel specialist from his own staff. This was the same attorney who became the management advocate at the EEOC hearing.

The deviant procedures in this case commenced when Konopnicki himself, who was found to have taken actions adverse to petitioner, was designated to adjudicate by the DARCOM Director of EEO. This designation was sanctioned by the Secretary of the Army in an April

8, 1981 letter from the Army Director of EEO stating that the case would be fairly and impartially adjudicated. That this letter was dated only five (5) days after the Dallas USACARA ROI appears to more than coincidental. Nevertheless, this egregious departure from due process occurred when the general selected two employees from his own command [unit] which is, of course, also petitioner's own command, to generate a secret EEO investigative file, upon which the general based his subsequent determination to reject petitioner's claim.

These steps taken by the general as head of TSARCOM, in an abuse of power and authority, are very much like leaving the fox to guard the chickens and clearly violates the provisions of 5 U.S.C. 552a et seq. and 29 C.F.R. 1613.201 et seq. The C.F.R. 1613 and Army Civilian Personnel Regulations §713 specifically prohibited Konopnicki from conducting his own investigation for four (4) reasons:

1. Only USACARA was **authorized** to conduct it [§1613.216(b) and 713.B-6a(1)];

2. The person assigned to investigate **must not come from under the jurisdiction of that part of the agency from which the complaint arose** §1613.216(a)];

3. The person designated to make the decision for the head of the agency shall be one who is **fair, impartial and objective** [§1613.221(a), §713.B-4c and FPM Ltr 713, ¶5, requiring an "informed and impartial" adjudication;] and

4. When the activity Commander is the alleged discriminating official, the investigator's **report will be submitted to the next higher Commander** [the Commander at DARCOM] for action. [§713B-6h(a)(3)]. In this case the TSARCOM commander was not just an ADO; he was found to be implicated in a finding of discrimination.

Therefore, since Konopnicki was asserted to be in a position adverse to petitionet he should have been foreclosed from sitting in adjudication on petitioner's case. To do so was a clear violation of her due process rights

under the U.S. Constitution and the due process rights promised under both Title VII of the Civil Rights Act and the Privacy Act.

It is well established that one cannot be simultaneously a judge and an advocate. In **Coolidge v. New Hampshire**, 403 U.S. 443, 91 S. Ct. 2022, this Honorable Court struck down a search warrant issued for the defendant's property by the attorney-general of the State of New Hampshire, the chief adversary of the criminal defendant. This Court recognized that the attorney-general of New Hampshire was not a neutral and detached magistrate interposed between the people and law enforcement.

A judge cannot benefit from the matters that he is deciding [**Tumey v. Ohio**, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)].

Due process of law is, of course, to be applied to administrative hearings. **Goldberg v. Kelly**, 397 U.S. 254 (1970). In the case of petitioner, Konopnicki's resort to his own unilateral compilation of existing documents and generation of new ones regarding petitioner, without notice to her and in violation of 5 U.S.C. 552a et seq. and 29 C.F.R. 1613.201 et seq., deprived petitioner of due process of law under the 5th Amendment to the Consti tution of the United States.

Furthermore, if the Army wanted commanders to conduct investigatins for complaints arising under their own commands it would have to receive an exception from the §1613 et seq. provisions promulgated by the EEOC and it could then abolish the USACARA services for this purpose. It is certainly more than reasonable to conclude that Army regulations were never meant to allow a commander to pass judgment on a complaint in which he himself was directly implicated in a finding of discrimination. It is also fair to say that if Konopnicki's actions are given the sanction of law, no individual prosecuting an EEO complaint involving the head of that part

of the agency from which a complaint arose could ever expect to prevail at the administrative level within the agency.

CONCLUSIONS

This is a case of first impression, involving the interpretation of federal law governing the procedures to be followed in federal employment discrimination claims being presented for federal agency administration. This Honorable Court should grant certiorari to enunciate and resolve these questions of major impact on not only petitioner's due process rights byt on those of all federal employees which come under the protection of the Privacy and Civil Rights Acts.

Respectfully submitted.

ROGER S. HANSON,
Attorney for the Petitioner
Member of the Bar of the
U.S. Supreme Court

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Barbara Bailey Howard,
Plaintiff,
vs.
John O. Marsh, Jr.,
Secretary of the Army,
Defendant.

FILED Apr. 4, 1984
Eyvon Mendenhall
U.S. District Court
E. District of MO.
No. 82-587 c (2)

MEMORANDUM

This matter is before the Court for a decision on the merits after trial to the Court. Plaintiff brings this action alleging that defendant disclosed records pertaining to her to certain individuals without her consent in violation of the Privacy Act of 1974, 5 U.S.C. §552a. Plaintiff seeks compensatory and injunctive relief.

After consideration of the testimony adduced at trial. the exhibits, the parties' stipulation of uncontested facts, the parties' briefs and the applicable law, the Court enters the following Memorandum which it adopts as its findings of fact and conclusions of law in accordance with Rule 52(a), Fed.R.Civ.P.

Plaintiff is a citizen of the United States who resides within the territorial jurisdiction of this Court. From December, 1978, until July, 1982, plaintiff was an employee of Department of the Army Troop Support and Aviation Materiel Readiness Command ("TSARCOM"), St Louis, Missouri. During that time period, plaintiff's job positions were that of GS-160-13 Equal Employment Opportunity ("EEO") Officer (December, 1978 - February, 1981) and GS-2050-11 Supply Cataloger (February, 1981 - July, 1982).

Defendant John O. Marsh, Jr., at all relevant times was Secretary of the Army. Plaintiff has instituted this action against defendant in his official capacity.[1]

This Court has jurisdiction over plaintiff's action under 28 U.S.C. §1331, and 5 U.S.C. §555a(g)(5). Venue is proper in the Eastern District of Missouri under 28 U.S.C. §1391(e) and 5 U.S.C. §52a(g)(5).

1. Plaintiff originally brought this action against Major General Emil L. Konopnicki, Commander, U.S. Army Troop Support & Aviation Materiel Readiness Command. At trial, on motion of defendant without objection by plaintiff, John O. Marsh, Jr., Secretary of the Army, was ordered substituted as the proper party defendant.

In September, 1980, plaintiff initiated a formal administrative complaint of employment discrimination concerning the denial of a within grade salary step increase. In December, 1980, plaintiff's supervisor, Colonel Booker T. McManus, proposed that plaintiff be downgraded from her position for unsatisfactory performance. An investigator from the United States Army Civilian Appellate Review Agency ("USACARA") conducted an investigation into plaintiff's discrimination complaint in January, 1981, and submitted his completed Report of Investigation ("ROI") on April 3. 1981, to Mr. George Jones, Director of Equal Employment Opportunity, Department of the Army Materiel Development and Readiness Command ("DARCOM"), (the immediate higher headquarters of TSARCOM), Alexandria, Virginia. The ROI concluded that the personnel actions (denial of within grade salary step increase and downgrade in position) taken against plaintiff were based on sex discrimination and recommended restoration of plaintiff to her position as EEO Officer.

The USACARA ROI was then referred to Major General Emil L. Konopnicki, Commander of TSARCOM, pursuant to Department of the Army Civilian Personnel Regulatiom ("DA CPR") 700 B-6(h)(1). Major General Konopnicki was vested with authority pursuant to DA CPR 713.B-6(h)(1) and 713B-7(b)(1) to

"reject, modify, or approve the recommendations contained in the investigative file." After reading the entire ROI and its attachments, Major General Konopnicki determined that the ROI was incomplete. He therefore authorized his staff to compile all other appropriate existing documents pertaining to plaintiff in order to enable him to make his determination based upon a complete report.

Pursuant to Major General Konopnicki's authorization, Mr. Robert Willenbrink, Attorney in the TSARCOM legal office, with the technical assistance of Mrs. Valada Henson, a personnel specialist from the TSARCOM Civilian Personnel Office. reviewed pertinent files in the Equal Employment Opportunity Office and prepared a memorandum of rebuttal of the USACARA ROI entitled "Management Position and Rebuttal to USACARA's Report of 3 April 1981 In The Complaint of Ms. B. Bailey Howard." Attached to the memorandum were 111 exhibits. All of these exhibits came from existing files in the TSARCOM Office, Office of the Chief of Staff, the Deputy Commander's Office, and the Civilian Personnel Office.

Plaintiff contends that the disclosure of the records pertainng to her to Robert Willenbrink and Valada Henson violated her rights under the Privacy Act.

The pertinent provisions of the Privacy Act provide:

> (b) **Conditions of disclosure.** - - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be - -
>
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties:
>
> . . .
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section.

5U.S.C. §552a(b)(1) and (3). Plaintiff may bring a civil action for a violation of section 552a (b) only if she suffered an "adverse effect" as a result of the violation. 5 U.S.C. §552a(g)(1)(D). See **Parks v. United States Internal Revenue Service**. 618 F.2d 677, 682-83 (8th Cir. 1980). Additionally. in order to receive actual damages for a violation of the Act. plaintiff must show that the agency acted in a manner which was "intentional or willful." 5 U.S.C. §552a(g)(4).

Defendant contends that plaintiff has not suffered a Privacy Act violation because (1) the disclosed documents were not within a "system of records" as defined by the Act, and (2) the disclosure of information pertaining to plaintiff to Willenbrink, Henson, and others fell within the exceptions contained in 5 U.S.C. §552a(b)(1) and (3). Further, defendant argues that even if plaintiff has suffered a Privacy Act violation, she may not recover compensatory damages because (1) she has failed to show that she suffered any "adverse effect" as a result of the disclosure, and (2) she has failed to show that any of the violations were "willful or intentional." Finally, defendant contends that plaintiff may not obtain injunctive relief because such relief is not available for violations of 5 U.S.C. §552a(b).

Defendant's argument that the documents attached to management's rebuttal memorandum were not within a "system of records" is without merit. The Privacy Act defines "system of records" to mean "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. §552a(a)(5). Many of the documents incorporated in management's rebuttal memorandum were contained in plaintiff's personnel file and the EEO files maintained by defendant. Clearly, these documents were name retrievable and thus were within a

"system of records" mantained by defendant. Cf. **Hernandez v. Alexander**, 671 F2d 402 (10th Cir. 1982); **Parks v. United States Internal Revenue Service, supra**. (Fact that EEO files and personnel files are "systems of records" was uncontroverted).

Equally unavailing is defendant's contention that the disclosure of the documents incorporated in management's rebuttal memorandum fell within the exceptions contained in 5 U.S.C. §552a(b)(1) and (3).

Under §552a(b)(1). defendant contends that Major General Konopnicki had a "need for the record[s] in the performance of [his] duties" because he was required to accept, reject, or modify the USACARA report and because he believed additional documentation was necessary to make an informed decision. Willenbrink and Henson, defendant argues, also had a need for the records because they were authorized by Konopnicki to compile the additional documents.

Defendant's argument fails at its first premise. Regulations of the Equal Employment Opportunity Commission, expressly made applicable to the Department of the Army by 29 C.F.R. §1613.202(b)(i) (1982), see **Hernandez v. Alexander**, 671 F.2d at 410, n.7, required Konopnicki to make his decision "based on information in the complaint file." 29 C.F.R. §1613.221(a). The only investigative documents that are to be included in the "complaint file" are documents contained in the "investigative file."

29 C.F.R. §1613.222(d). **Only persons who are not "directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose" are authorized to investigate and include documents in the "investigative file."** 29 C.F.R. §1613.216(a).[2] Thus, Konopnicki did not have authority to authorize Willenbrink and Henson, "employees under the jurisdiction of the head of that part of the agency in which the complaint arose," to conduct an independent investigation of the matters raised in plaintiff's discrimination complaint. Because the authorization was invalid, therefore, the Court finds that disclosure of records pertaining to plaintiff to Willenbrink and Henson was not "to those officers and employees of the agency . . . who [had] a need for the record[s] in the performance of their duties" under 5 U.S.C. §552a(b)(1).

Similarly, disclosure to Willenbrink and Henson was not "for a routine use" under 5 U.S.C. §552a(b)(3). The Privacy Act defines "routine use" to mean, "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. §552a(a)(7). As indicated above, the documents in plaintiff's EEO files and personnel files were not collected to enable Konopnicki to conduct an independent investigation of the matters

2. In the Department of the Army, authority to investigate discrimination complaints is given only to USACARA. DACPR 700.B-6(1).

raised in plaintiff's discrimination complaint. Thus, the use of these documents by Willenbrink and Henson to prepare a rebuttal memorandum to the USACARA ROI was not a use which was compatible with the purpose for which the documents were collected. Therefore, defendant's argument that disclosure to Willenbrink and Henson falls under the "routine use" exception contained in 5 U.S.C. §552a(b)(3) is without merit.

Consequently, because the Department of the Army, pursuant to Major General Konopnicki's authorization, disclosed records contained in a "system of records" to Willenbrink and Henson without plaintiff's consent, plaintiff may recover compensatory damages and costs of this action from defendant under the Privacy Act if she suffered an "adverse effect" as a result of the disclosure, 5 U.S.C. §552a(g)(1)(D), and if the disclosure was "intentional or willful." 5 U.S.C. §552a(g)(4)(A) and (B).

The Eighth Circuit Court of Appeals has held that mental distress or embarrassment constitutes an "adverse effect" under the Act. **Parks v. United States Internal Revenue Service**, 618 F.2d at 682-683. Plaintiff testified during the trial that she was "upset" and "embarrassed" as a result of the disclosure of the information contained in her personnel and EEO files. The Court finds her testimony in this respect to be credible. Thus, plaintiff has sufficiently shown an "adverse effect" as a

result of the improper disclosure.

Finally, the Court finds that the improper disclosure was "intentional or willful" within the meaning of the Act. The legislative history of the Act provides some guidance in interpreting the words "intentional or willful":

> In a suit for damages, the [compromise] amendment reflects a belief that a finding of willful, arbitrary or capricious action is too harsh a standard of proof for an individual to exercise rights granted by this legislation. Thus the standard was reduced to "willful or intentional" action by an agency. On a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence.

Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, reprinted in 120 Cong. Rec. 40405, 40406 (1974).

In this case, it is clear that Major General Konopnicki intentionally authorized the improper disclosure to Willenbrink and Henson; no form of negligence was involved. **Parks v. United States Internal Revenue Service**, 618 F.2d at 683. Thus, the "intentional or willful" standard has been satisfied.

For the foregoing reasons, the Court finds that plaintiff has established that defendant violated the Privacy Act. that the violation resulted in an

adverse effect to plaintiff, and that the violation was intentional. Thus, plaintiff may recover actual damages and costs under 5 U.S.C. §552a(g)(4)(A) and (B). This subsection provides that "a person entitled to recovery [shall not] receive less than the sum of $1,000." **Id.** Because the Court finds that plaintiff's damages are less than $1,000.00, it will award the statutory minimum $1,000.00 sum to her, together with her costs in this action.[3]

Plaintiff also seeks injunctive relief ordering the defendant "to take steps to prevent the improper disclosure of its records of its employees." Injunctive relief for violations of the disclosure provisions of the Privacy Act, however, is not available in this circuit. **Parks v. United States Internal Revenue Service**, 618 F.2d at 683-84. The Court will therefore find for defendant on plaintiff's claim for injunctive relief.

Dated this 4th day of April, 1984

ss: _____
EDWARD L. FILIPPINE
UNITED STATES
DISTRICT COURT

3. The Court need not decide whether subsequent disclosures to other individuals violated the Privacy Act. The Court finds that even if all the disclosures mentioned by plaintiff during trial and in her briefs were violative of the Privacy Act, plaintiff's total damages would not exceed the sum of $1,000.00.

Barbara Bailey Howard,
Plaintiff,
vs.
John O. Marsh, Jr.,
Secretary of the Army,
Defendant.

FILED Apr 4, 1984
Eyvon Mendenhall
U.S. District Court
E. District of Missouri
No. 82-587 C 2

JUDGMENT

In accordance with the Memorandum filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff shall have judgment against defendant in the sum of $1,000.00 on plaintiff's claim for actual damages.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant shall have judgment against plaintiff on plaintiff's claim for injunctive relief.

IT IS FURTHER ORDERED that plaintiff's claim for injunctive relief be and is DISMISSED with prejudice.

IT IS FURTHER ORDERED that costs shall be taxed against defendant.

Dated this 4th day of April, 1984.

ss: _____
EDWARD L. FILIPPINE
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Barbara Bailey Howard,	**FILED**
Plaintiff,	**Sep. 13, 1984**
vs.	**Eyvon Mendenhall**
John O. Marsh, Jr.,	**U.S. District Court**
Secretary of the Army,	**E. District of Mo.**
Defendant	**No. 82-587 C (2)**

MEMORANDUM AND ORDER

This matter is before the Court on the motion of defendant to alter or amend judgment. Defendant has filed a memorandum in support of its motion. Plaintiff has filed a memorandum in response thereto.

After careful consideration of the issues raised by defendant in his motion, the Court reaffirms its earlier holdings on those issues. The Court believes, however, that a few matters need further elaboration in this memorandum.

First, the Court in its earlier memorandum referred to the case of **Parks v. United States Internal Revenue Service**, 618 F.2d 677 (10th Cir. 1980), as being an Eighth Circuit case. The Court regrets the error and will amend its earlier memorandum to reflect the fact that **Parks** was a Tenth Circuit case.

The rationale and holdings of **Parks** on the issues for which it was relied upon, however, are persuasive to this Court. Thus, the Court's present recognition of the fact that **Parks** was a Tenth Circuit case and not an Eighth Circuit case in no way affects this Court's earlier rulings and judgment.

Second, the Court believes an additional finding is appropriate on the issue of whether Major General Konopnicki's improper authorization of disclosure of documents pertaining to plaintiff was "intentional or willful" within the meaning of the Privacy Act. In its earlier memorandum, the Court found that said authorization was clearly intentional and thus satisfied the "intentional or willful" standard in the Act. In order to more fully explain the Court's rationale in finding an intentional violation, the Court today additionally finds that Major General Konopnicki made the improper authorization "without grounds for believing it to be lawful" and by "flagrantly disregarding [plaintiff's] rights under the Act." See **Albright v. United States of America**, No. 83-1143, slip op. at 16 (D.C. Cir. April 10, 1984). The Court will incorporate this additional finding in its earlier memorandum.

In conclusion, with the corrections and additions referred to above, the Court reaffirms its earlier memorandum and judgment and accordingly will deny defendant's motion.

In accordance with the foregoing,

IT IS HEREBY ORDERED that defendant's motion to alter or amend judgment be and is DENIED.

IT IS FURTHER ORDERED that this Court's memorandum of April 4, 1984, be and is amended in the following respects:

(1) All references to the case of **Parks v. United States Internal Revenue Service** shall reflect that said case was decided by the Tenth Circuit Court of Appeals; and

(2) The finding made in the above memorandum concerning defendant's "intentional or willful" violation of the Privacy Act shall be incorporated in said April 4, 1984, Memorandum.

Dated this 13th day of September, 1984.

ss:_____

EDWARD L. FILIPPINE
UNITED STATES
DISTRICT JUDGE

STATUTES INVOLVED

The Privacy Act, 5 U.S.C. §552a, provides, in pertinent part:

(a) Definitions.

For purposes of this section --

* * *

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

Conditions of disclosure.

No agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . except . . . with the prior written consent of [] the individual to whom the record pertains, unless disclosure of the record would be --

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties [or]

* * *

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section[.]

The Privacy Act, 5 U.S.C. §552a(g) provides, in pertinent part:

> (1) Whenever any agency
>
> * * *
>
> (D) Fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency[.]
>
> * * *
>
> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of --
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000: and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-2498

Barbara Bailey Howard,
Appellee,
vs.
John O. Marsh, Jr.
Secretary of the Army,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

---

Submitted: November 12, 1985
Filed: March 12, 1986

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BOWMAN, Circuit Judge.

In this case, we confront the question whether an Army commander or other federal official who directs his staff to examine records of the agency

he heads in order to respond to an employee's allegation of discrimination thereby violates the Privacy Act of 1974, 5 U.S.C. §552a. After a bench trial, the District Court held that such an examination of agency records violated 5 U.S.C. §552a (b). See **Howard v. Marsh**, 596 F. Supp. 1107, 1111 (E.D. Mo. 1984). We reverse.

From 1978 to 1982, plaintiff-appellee Barbara Bailey Howard was a civilian employee of the United States Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) in St. Louis. In September 1980, Howard filed a formal administrative complaint of discrimination regarding the denial of a within-grade salary increase in her position as an Equal Employment Opportunity (EEO) officer. At the recommendation of her supervisor, Colonel Booker T. McManus, Howard was "downgraded" in December 1980 from her position as an EEO officer because of "unsatisfactory performance." Subsequently, an investigator from the United States Army Civilian Appellate Review Agency (USACARA) evaluated the allegations in Howard's discrimination complaint and issued a Report of Investigation (ROI). The investigator concluded in the ROI that Howard was denied the salary increase and was demoted because of sexual discrimination and recommended that she be reinstated as an EEO officer.

The USACARA ROI was submitted to George Jones, the Director of EEO at the Department of the Army Materiel Development and Readiness Command (DARCOM), which is the immediate higher headquarters for TSARCOM. The ROI was forwarded to TSARCOM where it was evaluated by Robert Willenbrink, an attorney with TSARCOM, and Brigadier General James Hesson, TSARCOM's Deputy Commander. After concluding that the ROI was incomplete, misleading, and biased, Willenbrink and Valada Henson, a personnel specialist with TSARCOM's Civilian Personnel office, prepared an "Agency Rebuttal" at the direction of TSARCOM's Commander, Major General Emil Konopnicki. This Agency Rebuttal consisted in large part of information from TSARCOM files. On the basis of the Agency Rebuttal, in June 1981 General Konopnicki rejected the ROI recommendation that Howard be reinstated.

In April 1982, Howard filed a complaint in the District Court, alleging that the disclosure to Willenbrink and Henson of documents concerning her in TSARCOM files violated the Privacy Act. The District Court held that the disclosure of Howard's employment record to Willenbrink and Henson violated the Privacy Act because the disclosure was not within any of the statutory exceptions authorizing disclosure. The District Court, in arriving at its decision,

did not address a variety of other alleged disclosures arguably violative of the Privacy Act, instead relying only on the disclosures occurring during the preparation of the Agency Rebuttal. Thus, only the disclosures resulting from preparation of the Agency Rebuttal are properly before us. The Secretary concedes that Howard's remaining allegations still would be open on reversal and remand of this case.

The Privacy Act restricts the circumstances in which an agency may disclose records pertaining to an individual. §552a(b) of the Act states that "[n]o agency shall disclose any record... to any person.., except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains" unless the disclosure falls within one of the statutory exceptions. The Secretary contends that the Act authorizes the disclosure here at issue under the exceptions contained in subsections (b) (1) and (3). Subsection (b)(1) permits the disclosure of a record "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties.," Similarly, subsection (b)(3) authorizes the disclosure of a record "for a routine use." Because we believe that the disclosure in this case was within the ambit of subsection (b)(1), we conclude that the Privacy Act was not violated, and we

reverse the judgment of the District Court.

The District Court found that EEOC regulations applicable to the army [1] required General Konopnicki to accept, reject, or modify USACARA ROI based only on information in the complaint file. See 596 F. Supp. at 1110, citing 29 C.F.R. §1613.221(a). The court reasoned that:

> [t]he only investigative documents that are to be included in the "complaint file" are documents contained in the "investigative file." 29 C.F.R. §1613.222(d). Only persons who are not, "directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose" are authorized to investigate and include documents in the "investigative file." 29 C.F.R. §1613.216(a). Thus, Konopnicki did not have authority to authorize Willenbrink and Henson, "employees under the jurisdiction of the head of that part of the agency in which the complaint arose," to conduct an independent investigation of the matters raised in plaintiff's discrimination complaint.

See 596 F. Supp. at 1110 (footnote omitted). Since the court concluded that the investigation was improper, the court found that the disclosure of the

1. See 29 C.F.R. §1613.201(b)(i).

records to Willenbrink and Henson was to employees who did not have a need for the records in performing their duties and that the disclosure therefore violated the Privacy Act. **Id.** at 1110-11.

The Secretary asserts that the District Court erroneously construed the regulations detailing the procedures an agency must follow when one of its employees files a discrimination complaint. The Secretary contends that while it is true that General Konopnicki could not conduct the official EEO investigation mandated by 29 C.F.R. §1613.216(a), there is no statute or regulation that bars him from examining the records of the agency he heads to decide whether to make an informal adjustment of a discrimination complaint, to prepare the agency's response to a complaint, or to prepare for possible proceedings before the Merit Systems Protection Board or the Equal Employment Opportunity Commission should the disposition of the complaint eventually be appealed to those bodies. We agree.

We believe that the Army complied with the regulations governing Howard's administrative complaint of discrimination. After the filing of that complaint, USACARA conducted an investigation pursuant to §1613.216. The investigator was a person neither directly nor indirectly "under the jurisdiction of the head of that part of the agency in

which the complaint arose." 29 C.F.R. §1613.216(a). Once the USACARA ROI was submitted to General Konopnicki, he directed Willenbrink and Henson to search TSARCOM's records for further information. On the basis of the Agency Rebuttal generated by this search, General Konopnicki forwarded to Howard a "Notice of Proposed Disposition of Discrimination Complaint" in accordance with the provisions of §1613.217(b) dealing with the procedure to be followed when the parties have not arrived at an informal adjustment of the complaint. See 29 C.F.R. §1613.217(b). We have found nothing, and indeed would be startled to find anything, that would prohibit TSARCOM from examining its records pertaining to Howard, a TSARCOM employee who had filed a discrimination complaint to which the agency needed to respond.[2]

2. Howard also argues that since the regulation relating to a hearing before a claims examiner directs the examiner to remand the case to the Director of EEO if he concludes that further investigation is necessary, the regulations preclude an agency from separately reviewing its own personnel files. See 29 C.F.R. §1613.218(b). We disagree. There is simply no indication in this or any other regulation that an agency is barred from reviewing its own files for the purpose of preparing its response to a complaint of employment discrimination.

We conclude that in the circumstances here presented TSARCOM's examination of its records pertaining to Howard was for a proper purpose and was not prohibited by the EEOC regulations applicable to the Army. This being the case, the disclosure of the records to TSARCOM employees Willenbrink and Henson comes within the exception in subsection (b)(1) of the Act. Willenbrink was an attorney and Henson was a personnel specialist. Both individuals were employed in positions that made them appropriate persons to gather information concerning a discrimination complaint that had been filed against the agency, and the head of the agency directed them to do so. Accordingly, we hold that they had a need for the records in performing their duties, that subsection (b)(1) applies, and hence that the Privacy Act was not violated. The Tenth Circuit's decision in **Hernandez v. Alexander**, 671 F.2d 402 (10th Cir. 1982). supports this result. The court in **Hernandez** held that the Army was not liable under the Privacy Act for disclosing the contents of the plaintiff's EEO file to a staff attorney and a personnel specialist to determine whether "adverse personnel action" should be taken against the plaintiff. **Id.** at 410. The court based its decision on subsection (b)(1). concluding that the employees had need of the files in performing their duties, which included giving advice on

personnel matters. **Id.** We discern no reason to reach a different result in the present case.

The District Court relied on 29 C.F.R. §1613.221 to arrive at its conclusion that TSARCOM's preparation of the Agency Rebuttal was improper and that disclosure of the records to Willenbrink and Henson therefore was not necessary to the performance of their duties. We find this reliance misplaced. §1613.221(a) requires the agency head -- who in the context of this section is the Secretary of the Army -- or his designee[3] to make the final decision concerning the disposition of the discrimination complaint on the basis of information in the complaint file. We believe that the proceedings in the instant case were at the informal adjustment stage rather that at the final decision stage at the time the Agency Rebuttal was prepared. This conclusion derives strong support from the fact that a hearing subsequently was conducted before an EEOC claims examiner, which is the procedural step provided for in 29 C.F.R. §1613.218 following informal adjustment. Since we do not believe that the proceedings had reached the point requiring a

3. The Secretary of theArmy has designated the Director of Equal Employment Opportunity for this purpose. See Army Reg. CPR 713.B-9(c).

final decision by the Secretary or his designee, the provisions of this section simply do not apply to the question before us in the present case. Moreover, we are satisfied that when the Secretary's decision is required it will be proper for him or his designee to consider the Agency Rebuttal, which appropriately was received into evidence at the hearing before the claims examiner, thereby becoming a part of the hearing record and thus a part of the complaint file on which the Secretary's decision is to be based. See 29 C.F.R. §1613.221(a); see also **Id.** §1613.222(i); **Id.** §1613.218(f).

We conclude that the EEOC regulations do not prevent the Army from consulting its own personnel files or other records pertaining to a claim of employment discrimination. Having so concluded, we find that Willenbrink and Henson were employees who had a need for the records in the course of performing their duties and that the disclosure to them therefore did not violate the Privacy Act. Accordingly, we reverse the judgment of the District Court and remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-2498

Barbara Bailey Howard,
Appellee,
vs.
John O. Marsh, Jr.
Secretary of the Army,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Filed: May 29, 1986

Appellee's Petition for Rehearing has been considered by the Court and is hereby denied.

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

"No person shall . . . be deprived of life, liberty, or property without due process of law." **A**

Under 5 U.S.C. 552a it is provided in pertinent part, emphasis added:

Sec. 2

(a) The Congress Finds that--

(1) the privacy of an individual is directly affected by the collection, maintenance, use and dissemination of personal information by Federal agencies;

(3) the opportunities for an individual to **secure employment** . . ., and his right to **due process**, and **other legal protections** are endangered by the misuse of certain information systems; **B**

(4) the **right to privacy** is a personal and fundamental right**protected by the Constitution** of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, **it is necessary and proper for the Congress to regulate** the collection, maintenance, use and dissemination of information by such agencies.

Under 5 U.S.C. 552a(b)(1), it is provided in pertinent part, with emphasis added:

"(b) Conditions of disclosure. --No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another **C**

agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record would be--" (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;"

In pertinent part, 29 C.F.R. 1613.216(a)provides:

> The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose . . .

D

In §1613.217 "Adjustment of Complaint and offer of hearing" it is provided, with emphasis added:

> (a) The agency shall provide an **opportunity for adjustment** of the complaint on an informal basis **after the complainant has reviewed the investigative file**. For this purpose, the agency shall furnish the complainant and the complainant's representative a copy of the investigative file **promptly**, after receiving it from the investigator, and **provide opportunity for the complainant to discuss the investigative file with appropriate officials**.

E

Under the Army's Civilian Personnel Regulation, CPR 700 (C 16) 713.B-6h(3), "Investigator's Report", it is provided, with emphasis added:

> (3) When the **activity Commander** is the alleged discriminating official, the investigator's report will be submitted to the next higher Commander for action.

F

In pertinent part, 29 C.F.R. 1613.216(a) provides:

> The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose . . .

G

In Federal Personnel Manual Letter 713-42 it states in pertinent part. with emphasis added:

> Heads of Departments and Independent Establishments
>
> **Introduction**
>
> 1. The **purpose** of this letter is to set forth general guidance concerning the participation, in the discrimination complaint process outlined in [Part 1613] of the Commission's regulations, of persons named by complainants as "alleged discriminating officials." This letter supersedes all written and oral instructions which in the past have served as guidance on this matter.
>
> 2. The primary focus of previous discussions and guidance related to this matter has been on creating and maintaining **a positive environment** for the use of the complaint process by aggrieved individuals, and on insulating complainants (and witnesses) from the possibility of reprisal or harassment based on their participation in the complaint process . . .
>
> 3. It is vital, of course, that aggrieved employees and applicants continue to feel free to avail themselves of the **full due process afforded by the discrimination**

H

complaint procedures without fear of reprisal for having done so . . .

The Privacy Act, under 5 U.S.C. 552a "Records maintained on individuals, (e) AGENCY REQUIREMENTS," states, with emphasis added:

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, . . .

"(11) at least 30 days prior to publicatin of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any **new use or intended use** of the information in the system, and provide an **opportunity for interested persons** to submit written data, views, or arguments to the agency."

I

Konopnicki failed to adhere to §552a(e) under "Agency Requirements", which is quoted with emphasis added:

Each agency maintains a system of records shall --

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished **by statute** or by executive order of the President;

"(2) collect information to the greatest extent practicable **directly from the subject individual** whom the information may result in **adverse determinations** about an individual's rights, benefits and privileges under Federal programs;

J

Federal Personnel Manual Letter 713-42 provides in paragraphs 4 and 5, in part, with emphasis added:

4. There is in fact no **regulatory requirement that a complaint of discrimination include indentification of an alleged discriminating official."** Moreover, a complainant cannot always reasonably be expected to know which individual, if any, might have been responsible for the occurrence of a specific action or the promulgation of a particular policy. Complainants should not, therefore, be given the impression that they are required to identify "alleged discriminating officials" in complaints of discrimination . . .

K

5. The principal purpose of the discrimination complaint procedure is to determine whether in fact discrimination has occurred, so that remedial action can be **taken as appropriate. Investigations and hearings in discrimination complaint cases are essentially fact-finding processes which have as their purpose the development and recording of evidence on which an informed and impartial decision can be based.** It is not the purpose of the complaint procedure to indict or try individual officials; complaints are lodged "against" agencies, and not "against" individuals . . .

Federal Personnel Manual Letter 713-42, § §8 and 12 provides in part, with emphasis added:

8. In the interest of **fairness** to all persons involved in the processing of discrimination complaints and of assuring that the evidence compiled at various stages in the complaint process is complete in terms of presenting all relevant views on contentious matters, agencies should assure that persons named as "alleged

L

discriminating officials" are adequately informed of any charges made against them, and are afforded a full and fair opportunity to respond to such charges.

12. The agency official who is overseeing the processing of the complaint [George Jones of DARCOM] should keep an alleged discriminating official informed of the progress of the investigation in approximately **the same manner in which the complainant is kept informed**. When the investigation is completed, the **EEO officer should review the investigative file to determine whether or not it contains information relevant to all of the allegations**. If the EEO officer fnds that there are **allegations** against the alleged discriminating official in the investigative report **on which no opportunity was given the official to provide his or her version of the facts, then the EEO officer should require such additional investigation as may be needed for that purpose.**

Federal Personnel Manual Letter 713-42 is cited with emphasis added:

General Guidance

19 Complainants, of course, receive copies of the **investigative file**, the **hearing transcript**, etc. While statements included in complaint files are obtained without pledge of confidence [29 CFR 1613-.216(a)], those statements, **as well as other documents in the files** , frequently include information of a personal and sensitive nature. All persons given access to this information, including complainants and alleged discriminating officials, should be advised of the **ned to exercise discretion** with regard to its use. In this regard, the regulatory prohibition at [29 CFR 735.206] against **use of**

M

certain official information for private purposes would have general applicability. In addition, **Privacu Act restrictions against improper disclosure are binding in agency employees.**

The purpose of the Federal EEO implementing regulations and guidelines is made abundantly clear by ¶¶20 and 21, with emphasis added:

20. It is essential to the **integrity of the complaint system** that complainants, their representatives, and witnesses be free from restraint, interference, coercion, discrimination or reprisal at any stage of the complaint process. In view of the broadened role for alleged discriminating officials provided for in these instructions, it is imperitive that agencies ensure, through training and other means of communication, that supervisory and management personnel are knowledgeable about the regulatory provision in this regard at [29 CFR 1613.261], and understand the **need to observe the spirit as well as the letter of the regulations.**

N

21. The procedures outlined above relate specifically to the processing of discrimination under [§§1613.211 through 1613.222] of the Commission's regulations. The principles reflected in these procedures [are] assuring that persons named as alleged discriminating officials are informed regarding any allegations made against them, are given a **full and fair opportunity to respond for the record** and are kept informed as to the progress and outcome of cases . . .

O

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Petitioner knows of no cases that are related to this Petition which are now pending before this Court.

ROGER S. HANSON
Attorney for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 7131 Mission Boulevard, Riverside, California 92509.

On August 27, 1986, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of four (4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Marc Richman, Esq.
U.S. Dept. of Justice
Washington, D.C. 20543

Solicitor General of the
United States
Washington, D.C. 20543

Clerk, U.S. Court of Appeals
8th Circuit, U.S. Courthouse
114 Market Street
St. Louis, Missouri 63101

Clerk, U.S. District Court
Eastern District of Missouri
U.S. Courthouse
114 Market Street
St. Louis, Missouri 63101

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 27, 1986, at Riverside, California.

JACK GALLAGHER